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Physician recruitment: A cautionary tale

Physician recruiting can be expensive. Doing it wrong can be even more expensive, as a recent multimillion-dollar settlement illustrates.

When a group practice needs financial assistance to bring on an additional physician, hospitals may be willing to put up funds to protect the practice from incurring a loss as the new doctor becomes established in the community. Such recruitment agreements with hospitals are generally structured as monthly advances of the difference between the new physician's collections and the cost of employing him or her, and treated as forgivable loans to the practice so long as the physician continues to practice in the hospital's service area for a defined period. This kind of investment often pays dividends to a hospital by way of increased admissions and outpatient services, but the deals are only permissible if they benefit the community, not just the hospital. The rules regulating these agreements can be complicated, and there are many ways to run afoul of them by carelessness and inattention to detail. This is not one of those cases.

In April 2020, Centra Health Inc. and Blue Ridge Ear, Nose, Throat and Plastic Surgery, Inc. (BRENT) of Lynchburg, Va., agreed to pay an aggregate of \$9,345,845 to settle claims alleging

they violated the False Claims Act and the Virginia Fraud Against Taxpayers Act by engaging in improper financial relationships. The settlement is neither an admission of liability by the hospital and group, nor a concession by the government that the whistleblower claims were not well founded.

Many, but not all, of those violations stemmed from noncompliant physician recruiting arrangements.

The Stark Law exception

The Stark physician self-referral law generally prohibits referrals by a physician to any provider of Designated Health Services (DHS, including hospital services) if the physician has a compensation or ownership interest with the DHS provider, unless an exception is met. (A quick refresher – Stark exceptions are mandatory because the law provides for "strict liability" without need to prove improper intent. The Anti-Kickback Statute's safe harbors are optional, but provide valuable protection if met. There is no equivalent safe harbor for physician recruiting except in Health Practitioner Shortage Areas.)

The Stark exception for physician recruiting payments by hospitals prescribes a number of specific requirements, including but not limited to:

- Payments must be to the physician

or to a group practice that employs the physician, and intended to induce the physician to relocate his or her medical practice (generally by at least 25 miles for established physicians) to the geographic area served by the hospital in order to become a member of the hospital's medical staff.

- The agreement must be in writing, signed by the parties, and may not be conditioned on the physician's referral of patients to the hospital.

- The amount of payment may not be determined in a manner that takes into account (directly or indirectly) the volume or value of any actual or anticipated referrals by the physician or the practice, or other business generated between the parties.

- The physician must be permitted to join other hospital staffs and refer patients to other hospitals.

- Any income guarantee made by the hospital to a practice recruiting a new physician may not exceed the actual additional incremental costs attributable to the recruited physician. These costs include salary, benefits, insurance, recruiters' fees and only such other costs like added personnel, space or equipment that are needed solely to support the recruit.

Alleged violations

So where did BRENT and Centra

go wrong? First, although the agreement between the parties limited the income guarantee to incremental costs, BRENT allegedly claimed reimbursement for costs that were not attributable solely to employment of the recruit and Centra paid them, both knowing they were more than the allowable amounts. Next, Centra paid guarantees for physicians who had already relocated to south-central Virginia – the exception is only available to help a group bring a new doctor to the hospital's service area, not to support one who has already arrived. Even worse, the hospital also entered into physician employee compensation arrangements that took into account the value of referrals for in-office laboratory tests, financial arrangements with physicians that were not memorialized in a written and executed contract, and agreements with trauma call coverage physicians and an oncology practice that did not satisfy any exception to the Stark Law.

The group and the hospital allegedly fudged the numbers to keep cash flowing to the practice. Some expenses attributed to the physician were in fact benefit costs for another employee and others were labeled “rent” payments (even though BRENT owned its building). The complaint also indicated that the group improperly deposited checks payable to the physician who was recruited under the deal without his permission or knowledge.

How did this case get to court? The recruited physician left the hospital, which then tried to recover from him \$80,000 representing the portion of the hospital's subsidies that had not yet been forgiven. In response to collection efforts, the physician disputed the debt

and filed a *qui tam* whistleblower suit under seal in 2016. Surprisingly, this is not uncommon where there are irregularities in recruiting arrangements. He will be entitled to share in the nearly \$10 Million settlement. The government intervened earlier this year, which also follows a pattern we have seen in recent years where the Department of Justice lets the whistleblower's private attorney build the case and only intervenes toward the end to finalize a settlement.

The result may look devastating for Centra, but it could have been worse. According to the Justice Department's press release, “Centra and its affiliated hospitals stepped up and self-disclosed their improper relationships with physician groups, including blatant violations of the Stark self-dealing law, compensation for referrals, and problematic physician recruitment agreements,” said Maureen R. Dixon, Special Agent in Charge of the Office of Inspector General for the U.S. Department of Health and Human Services. “We will continue working closely with our State and Federal partners to protect the integrity of government health programs.”

BRENT shouldered \$1.6 million of the settlement, while Centra agreed to pay \$1.8 million for the recruitment violations and an additional \$5.9 million for settlement of its self-disclosure of the other potential Stark Law violations. Centra performed an internal audit and discovered 58 additional physician compensation arrangements which failed to meet appropriate standards. By disclosing these violations voluntarily, the health system reduced the amounts necessary to resolve its compliance failures. It is unusual for a

voluntary disclosure to occur alongside a whistleblower, but Centra wisely reviewed its own additional financial relationships with physicians and came forward before they were discovered by this whistleblower, other tipsters, or a government audit. The False Claims Act generally authorizes maximum penalties of three times the amounts paid by government programs tainted by a violation, plus an additional per-claim amount of up to \$23,331. Providers who voluntarily disclose FCA violations can reduce the multiplier to 1.5 and avoid the per-claim penalties.

Lessons learned

Recruitment agreements between hospitals and physician practices should be carefully designed to comply with all regulatory requirements, not just on paper, but in practice. The agreement in this case properly limited the subsidy amounts, but the parties disregarded those terms to maximize payments to the group.

Regularly scheduled internal audits can reveal compliance problems before they are raised by whistleblowers or auditors, and voluntary disclosures can significantly reduce the damage exposure. Before launching aggressive collection actions against physicians or other insiders, make sure your house is in order. And a robust, well-designed and effective compliance plan, properly implemented, could have prevented all of these problems before they occurred.

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